DKLS Sunshine Sdn Bhd v Kerajaan Negeri Pulau Pinang & Anor

HIGH COURT (PULAU PINANG) — APPLICATION FOR JUDICIAL REVIEW NO 25–27–07 OF 2016
AZMI ABDULLAH JC
17 JUNE 2017

Civil Procedure — Judicial review — Application for — Applicant filed judicial review against decision of respondent — Respondents raised preliminary objection — Whether judicial review application against decision of first respondent acquiring three lots of land or against decision of second respondent on compensation — Whether judicial review application filed beyond time prescribed under O 53 r 3(6) of the Rules of Court 2012 — Whether issue as stated in preliminary objection could be raised at this stage of proceeding — Whether judicial review application could be challenged when attorney general had not raised any objection — Rules of Court 2012 O 53 r 3(6)

This was a judicial review application ('the present application') by the applicant against decision of the respondents. The respondents had raised a preliminary objection that the present application was filed beyond the time prescribed under O 53 r 3(6) of the Rules of Court 2012. The respondents relied on the Federal Court decision of *Kijal Resort Sdn Bhd v Pentadbir Tanah Kemaman & Anor* [2016] 1 MLJ 544 ('Kijal Resort') and argued that Form E was served on the applicant on 26 November 2014, as such, the filing of the present application on 4 July 2016 was clearly against the provision prescribed and the decision of the Federal Court. It was also submitted by the respondents that the judicial review application was against the acquiring of three lots of land by the first respondent under s 8(1) of the Land Acquisition Act 1960 ('the Act') through Penang State Government *Gazette* No 255 dated 17 April 2014. In response, the applicant submitted that: (a) the judicial review application filed was against the order made by the second respondent on 14 April 2016 pertaining to the compensation to be paid to the applicant, hence the applicant having filed the present application on 4 July 2016 had not surpassed the prescribed time for filing the application for judicial review; (b) the issue as stated in the preliminary objection could not be raised at this stage of the proceedings as it was never raised in the affidavits of the respondents; and (c) the issue of the judicial review being filed outside the timeframe could not be challenged at this stage of proceeding as there was no objection raised by the attorney general ('the AG') at the leave stage though the documents were properly served by the applicant.

Held, dismissing the application with the agreed costs of RM5,000:

(1) Paragraph 3(a) of the statement of facts (encl 3) of the present application clearly provided that 'leave is to be granted to obtain an Order for Certiorari to set aside the Land Acquisition No 70/2014 Government *Gazette* No GN: 255/17.4.2014 ...'. This had clearly reflected that the order for certiorari being sought in the present application was against the *gazette* dated 17 April 2014. Further, exh MCA2 (Form H issued for the lots of land in question) and exh MCA4 (a letter issued by the solicitors for the applicant) of the 'afidavit jawapan responden' showed that the hearing on 14 April 2016 was on the issue of compensation and not against the acquisition of the land. As the applicant's argument was that the present application was against the decision made by the second respondent on 14 April 2016, thus, the present application should be dismissed in limine for being defective in law and an abuse of process (see paras 10–12 & 14–15).

(2) The applicant had not disputed that 26 November 2014 was the date Form E was served on them hence the court found and took cognisance that this was the date that Form E was served on the applicant. Given that the present application was filed on 4 July 2016 (a lapse of almost 20 months later), the time frame of three months for the filing of a judicial review had long been surpassed hence the present application should be dismissed in limine (see paras 19–20).

(3) The Federal Court in *Kijal Resort* had decided that a preliminary objection on the issue of the timeframe for filing a judicial review being exceeded could be raised and accepted even at the Court of Appeal stage. Given this binding precedent, the court accepted the preliminary objection raised by the respondents in the matter before the court as there was no legal impediment in the law for such a recourse being undertaken by the respondents (see para 24).

(4) The respondents in the present application were not barred and estopped from raising the preliminary objection as this stage of the proceedings. The service of the documents by the applicant on the AG's Chambers before the leave application for judicial review was to satisfy the requirement of service and not in his capacity as the legal adviser to the government. The respondents were not served with the documents for the leave stage of the judicial review and thus would not be in the position to raise any objection without being in possession of the relevant documents. The respondents' appearance at the inter partes proceedings was their first and earliest opportunity for them to appear and raise the preliminary objection. Thus, the respondents were definitely entitled to raise the preliminary objection (see para 28).

[Bahasa Malaysia summary

Ini ialah suatu permohonan semakan kehakiman ('permohonan ini') oleh pemohon terhadap keputusan responden-responden. Responden-responden telah membangkitkan suatu bantahan awal bahawa permohonan ini telah difailkan selepas tempoh yang ditetapkan di bawah A 53 k 3(6) Kaedah-Kaedah Mahkamah 2012. Pihak responden bergantung kepada keputusan Mahkamah Persekutuan dalam kes *Kijal Resort Sdn Bhd v Pentadbir Tanah Kemaman & Anor* [2016] 1 MLJ 544 ('Kijal Resort') dan menghujahkan bahawa Borang E telah diserahkan kepada pemohon pada 26 November 2014, oleh itu, pemfailan permohonan ini pada 4 Julai 2016 adalah jelas bertentangan dengan peruntukan yang ditetapkan dan keputusan oleh Mahkamah Persekutuan. Responden-responden juga menghujahkan bahawa permohonan semakan kehakiman adalah terhadap pengambilan tiga bidang tanah oleh responden pertama di bawah s 8(1) Akta Pengambilan Tanah 1960 ('Akta') melalui *Warta* Kerajaan Negeri Pulau Pinang No 255 bertarikh 17 April 2014. Dalam hujahan balas, pemohon menghujahkan bahawa: (a) permohonan semakan kehakiman yang difailkan adalah terhadap perintah yang dibuat oleh responden kedua pada 14 April 2016 berkenaan dengan pampasan yang mesti dibayar oleh pemohon, maka tindakan pemohon memfailkan permohonan ini pada 4 Julai 2016 tidak melangkaui tempoh masa yang ditetapkan untuk memfailkan semakan kehakiman; (b) isu yang dinyatakan dalam bantahan awal tidak boleh dibangkitkan pada peringkat ini kerana ia tidak pernah dibangkitkan dalam afidavit oleh responden-responden; dan (c) isu bahawa semakan kehakiman ini telah difailkan diluar tempoh masa tidak boleh dicabar di peringkat ini kerana tiada bantahan yang dibangkitkan oleh pihak peguam negara ('PN') di peringkat permohonan izin mahkamah walaupun dokumen-dokumen telah diserahkan dengan sempurna oleh pemohon.

Diputuskan, menolak permohonan dengan kos yang dipersetujui sebanyak RM5,000:

(1) Perenggan 3(a) penyataan fakta (lampiran 3) permohonan ini jelas memperuntukkan bahawa 'izin hendaklah diberikan bagi mendapatkan suatu Perintah Certiorari untuk mengenepikan Pengambilan Tanah No 70/2014 *Warta* Kerajaan No GN: 255/17.4.2014 ...'. Hal ini telah memberikan gambaran yang jelas bahawa perintah certiorari yang hendak diperoleh dalam permohonan ini adalah terhadap *warta* bertarikh 17 April 2014. Selanjutnya, eksh MCA2 (Borang H yang dikeluarkan bagi tanah yang dipersoalkan) dan eksh MCA4 (surat yang dikeluarkan oleh peguam cara pemohon) 'afidavit jawapan responden' menunjukkan bahawa pendengaran pada 14 April 2016 adalah mengenai isu pampasan dan bukan terhadap pengambilan tanah itu. Oleh kerana hujahan pemohon bahawa permohonan ini adalah terhadap keputusan yang dibuat oleh responden kedua pada 14 April 2016, maka,

permohonan ini hendaklah ditolak in limine kerana cacat dari segi undang-undang dan suatu penyalahgunaan proses (lihat perenggan 10–12 & 14–15).

(2) Pemohon tidak pernah mencabar bahawa tarikh 26 November 2014 ialah tarikh Borang E diserahkan kepada mereka maka mahkamah mendapati dan mengambil kira bahawa ini ialah tarikh Borang E diserahkan kepada pemohon. Memandangkan permohonan ini difailkan pada 4 Julai 2016 (kelewatan hampir 20 bulan kemudian), tempoh masa tiga bulan untuk memfailkan suatu semakan kehakiman telah lama terlepas, maka permohonan ini hendaklah ditolak in limine (lihat perenggan 19–20).

(3) Mahkamah Persekutuan dalam kes *Kijal Resort* telah memutuskan bahawa suatu bantahan awal tentang isu tempoh masa yang telah dilangkaui bagi memfailkan suatu semakan kehakiman boleh dibangkitkan dan diterima meskipun di peringkat Mahkamah Rayuan. Berdasarkan duluan mengikat ini, mahkamah menerima bantahan awal yang dibangkitkan oleh responden-responden dalam hal perkara ini memandangkan tidak terdapat halangan perundangan dalam undang-undang bagi responden-responden menggunakan tindakan itu (lihat perenggan 24).

(4) Responden-responden dalam permohonan ini tidak dihalang dan diestop daripada membangkitkan bantahan awal di peringkat ini. Serahan dokumen oleh pemohon kepada Jabatan Peguam Negara sebelum permohonan izin bagi semakan kehakiman dibuat adalah untuk memenuhi kehendak serahan dan bukan atas kapasitinya sebagai penasihat undang-undang kepada kerajaan. Responden-responden tidak diserahkan dengan dokumen-dokumen di peringkat permohonan izin semakan kehakiman dan oleh itu tidak berhak untuk membangkitkan apa-apa bantahan tanpa memiliki dokumen-dokumen yang relevan. Kehadiran responden-responden pada prosiding inter parte merupakan kehadiran pertama dan kesempatan terawal bagi mereka untuk hadir dan membangkitkan bantahan awal. Oleh itu, responden-responden berhak untuk membangkitkan bantahan awal itu (lihat perenggan 28).]

Notes

For cases on application for judicial review, see 2(3) *Mallal's Digest* (5th Ed, 2017 Reissue) paras 5937–5949.

Cases referred to

Chow Hong Lit lwn Menteri Sumber Manusia, Malaysia & Satu Lagi [1998] 3 MLJ 63, HC (refd)

Kijal Resort Sdn Bhd v Pentadbir Tanah Kemaman & Anor [2016] 1 MLJ 544; [2015] 3 CLJ 861, FC (folld)

Legislation referred to

Land Acquisition Act 1960 ss 8, 8(1), 10, 38, 38(1), Forms E, H, N
Rules of Court 2012 O 53 r 3(2), (6)
Rules of the High Court 1980 O 53 r 3(6)

Ngeh Koo Ham (Ngeh & Co) for the applicant.
Anas bin Ahmad Zaki (State Legal Advisor, State Legal Adviser Office) for the second respondent.

Azmi Abdullah JC:

INTRODUCTION

[1] The application for judicial review in this case was filed on 4 July 2016. On 9 March 2017 it was agreed by the counsel appearing for the applicant and the honourable state legal adviser representing the respondents that the preliminary objection raised by the respondents on the basis that the judicial review is filed beyond the time prescribed under O 53 r 3(6) of the Rules of Court 2012 should first be heard and decided by this court before proceeding with the substantive issues.

[2] The cause papers for the judicial review application are:

(a) statement in accordance with O 53 r 3(2) of the Rules of Court 2012 (encl 3);

(b) *afidavit sokongan* affirmed on 9 September 2016 (encl 6);

(c) *afidavit jawapan responden* affirmed 27 October 2016 (encl 11);

(d) *afidavit balasan pemohon* affirmed on 18 November 2016 (encl 13);

(e) *afidavit jawapan kedua responden-responden* affirmed on 27 December 2016 (encl 15); and

(f) *afidavit balasan ketiga pemohon* affirmed on 9 January 2017 (encl 16).

[3] This court having perused the written submissions of the applicant and the respondents as well as further oral submissions decided on 10 April 2017 to uphold the preliminary objection raised hence dismissing the judicial review with costs. Dissatisfied with the finding of this court, the applicant has now filed an appeal to the Court of Appeal hence these grounds of judgment.

PRELIMINARY OBJECTION

[4] The respondents argue that this judicial review is against the acquiring of the three lots of land by the first respondent under s 8(1) of the Land

Acquisition Act 1960 land acquisition No 70/2014 through Penang State Government *Gazette* No 255 dated 17 April 2014 ('the *gazette*'). The respondents aver that Form E under s 10 of the Land Acquisition Act 1960 notifying the landowners/representatives of the *gazette* was served on 26 November 2014.

[5] The respondents further submits that on 14 April 2016, the second respondent arrived at a decision pertaining to the compensation to be paid to the applicant and the applicant being dissatisfied with the awards made, filed a Form N (application for the objection to be referred to court) under s 38(1) of the same Act on 23 May 2016.

[6] In pursuant of this, the applicant filed an ex parte application for judicial review on 4 July 2016 with the order granting leave to pursue a judicial review being obtained from the High Court on 6 September 2016 and following that, on 13 September 2016 an application for judicial review for an order of certiorari to set aside the acquisition of the land No 70 of 2014 under *Gazette* No 255, 17 April 2014 was filed.

[7] The respondents argument is based primarily on the Federal Court decision of *Kijal Resort Sdn Bhd v Pentadbir Tanah Kemaman & Anor* [2016] 1 MLJ 544; [2015] 3 CLJ 861 which held that an application for judicial review made under O 53 r 3(6) of the Rules of the High Court 1980 challenging the decision of state authority declaring that the land is to be acquired under the Land Acquisition Act 1960 must be filed within 40 days from the service of Form E (which is the notification of the *gazette* issued on 17 April 2014 on the respondents). Thus in this case as Form E was served on the applicant on 26 November 2014, the filing of the ex parte application for judicial review on 4 July 2016 is clearly against the provision prescribed and the decision of the Federal Court.

[8] The applicant however strenuously argues that the judicial review seeking an order for certiorari is made within time. It is the applicant's contention that the judicial review filed is against the order made by the second respondent on 14 April 2016 hence the applicant having filed the ex parte application for judicial review on 4 July 2016 definitely has not surpassed the prescribed time period for filing the application for judicial review.

ISSUE CONSIDERED

[9] This court, given the divergent viewpoints presented by the parties in this case has to decide whether the judicial review in this case is against the *gazette* dated 17 April 2014 issued under s 8 of the Land Acquisition Act 1960 with notification in Form E being delivered on the applicant on 26 November

2014 OR the judicial review for certiorari being sought is against the decision of the second respondent made on 14 April 2016.

[10] Upon a reading of the statement of facts (encl 3) of this application for judicial review filed by the applicant, *para 3(a) clearly states that 'leave is to be granted to obtain an Order for Certiorari to set aside the Land Acquisition No 70/2014 Government Gazette No GN: 255/17.4.2014* for lots known as GM 486 Lot 1384, Title 38712 Lot 1385, Title 39320 Lot 1887 with all being in Mukim 11, Daerah Seberang Perai Selatan, Negeri Pulau Pinang'. This court finds this has clearly reflected that the order for certiorari being sought under this judicial review application is against the *gazette* dated 17 April 2014. The argument by the applicant that the judicial review is against the decision of the second respondent made on 14 April 2016 is contrary to their own statement of facts and is untenable and ill conceived.

[11] This court now turns its attention to *afidavit jawapan responden* affirmed on 27 December 2016 (encl 15). Exhibit MCA2 are Form H issued for the lots of land in question. The Form H clearly spell out the purpose of the hearing under the heading 'Pemberitahu Pemberian Dan Tawaran Pampasan' in pursuant of the hearing conducted on 14 April 2016. This court is satisfied even further upon looking at these documents that the hearing on 14 April 2016 was to determine the compensation to be awarded to the applicant and most certainly not against the acquisition of the land.

[12] Exhibit MCA4 of the same affidavit is a letter issued by the solicitors for the applicant and para 3 of the letter states that the compensation offered in Form H is rejected and an objection under s 38 of the Land Acquisition Act 1960 has been presented to the court on 24 May 2016. *This goes to show that the hearing on 14 April 2016 was on the issue of compensation and NOT against the acquisition of the land.* The relevant content of the letter dated 17 November 2016 is produced herein:

> Kami ingin memaklumkan pihak tuan bahawa anakguam kami tidak menerima tawaran pampasan seperti yang tercatat di Borang H di atas. Adalah seterusnya dimaklumkan bahawa anakguam kami telah pada 24.5.2016 memfailkan bantahan terhadap pengambilan tanah-tanah tersebut untuk dirujuk di Mahkamah Tinggi Pulau Pinang iaitu dalam tempoh 6 minggu dari tarikh A wad Pentadbir Tanah iaitu pada 14.4.2016 (menurut Seksyen 38(3)(a), Akta Pengambilan Tanah 1960).

[13] For the applicant solicitor to now come to court and argue that this judicial review is against the acquisition of the land decided on 14 April 2016 is clearly a misconceived argument made to avoid the issue of time factor that the applicant has been caught in. The objection against the decision on

14 April 2016 would have to be by way of filing Form N to proceed with a land reference which the applicant's solicitors themselves have pursued as shown by exh MCA4.

[14] Thus this court finds that this judicial review application CANNOT be against the hearing on 14 April 2016 which was for compensation and would need to be pursued by way of land reference. This judicial review then can only be against the *gazette* made on 17 April 2014.

[15] As the argument by the applicant solicitor is that this judicial review is against the decision made by the second respondent on 14 April 2016, this judicial review should be dismissed in limine for being defective in law and an abuse of process.

GOVERNING PRINCIPLES

[16] In the Federal Court decision of *Kijal Resort Sdn Bhd v Pentadbir Tanah Kemaman & Anor* [2016] 1 MLJ 544; [2015] 3 CLJ 861 at p 863 of the case, held (4) Ramly Ali FCJ stated:

> An application for leave for judicial review made under O 53 r 3(6) of the RHC challenging the decision of the State Authority declaring that the land is to be acquired under the LAA, must be filed within 40 days from the date when the decision was first communicated to the appellant ie, on the date when the notice of enquiry in Form E which appended a copy of the schedule in Form D was served in pursuant to s 10 of the LAA on the registered proprietor or occupier of the land in pursuant to ss 11, 52, 53 and 54 of the LAA. Herein Form E was served on the appellant on 7 March 2006. Application for leave for judicial review was filed on 6 January 2008 ie almost 22 months after the decision to acquire the land in question was first communicated to the appellant. This was clearly beyond the 40 days timeframe as stipulated in O 53 r 3(6) of the RHC. There had been an inordinate delay on the part of the appellant in filing for judicial review. There was no indication to show that the appellant had applied for an extension of time. Thus the High Court had no jurisdiction to hear the appellant's application for judicial review on the ground that the time frame under O 53 r 3(6) had not been complied with. On this ground alone, the Respondent's first preliminary objection must be upheld and the judicial review application by the appellant ought to be dismissed in limine.

[17] It must first be noted however that the time period prescribed for the filing of a judicial review has been amended and enlarged from 40 days under O 53 r 3(6) the Rules of Court 1980 which was used in the case of *Kijal Resort Sdn Bhd v Pentadbir Tanah Kemaman & Anor* to three months under the O 53 r 3(6) of the Rules of Court 2012.

[18] Reference is made to encl 11 *afidavit jawapan responden* affirmed on

27 October 2016, exhs MCA1(a)–(c) at item 7 that show service of Form E was effected on the landowners/representatives for all three lots on 26 November 2014 and the same is reproduced herein:

> Notis awam dalam Borang E di bawah Seksyen 10 Akta Pengambilan Tanah 1960 telah diserahkan kepada tuanpunya tanah/wakilnya pada: 26/11/2014.

[19] The applicant has not disputed in the three affidavits filed by them as well as the written submission filed and even during oral submissions that 26 November 2014 was the date that Form E was served on them hence this court finds and take cognisance that this really is the date that Form E was served on the applicant.

[20] Given the fact that the ex parte application in this case was only filed on 4 July 2016 (a lapse of almost 20 months later), the time frame of three months for the filing of a judicial review has long been surpassed hence this judicial review should be dismissed in limine since the case of *Kijal Resort Sdn Bhd* is definitely on all fours with the judicial review before this court.

[21] Aggravating the situation further for the applicant, there has been no application for enlargement of time filed to cure and remedy the dire predicament of the applicant.

[22] The applicant argues that the issue of the applicant exceeding the prescribed timeframe for filing this judicial review cannot be raised by the respondents by way of a preliminary objection but instead should be pursued through of a proper application. It is also their contention that the objection raised is out of time since leave has been obtained from the court for the judicial review. To augment their objection, it is also argued that this issue cannot be raised at this stage of the proceeding as it was never raised in the affidavits of the respondents.

[23] This court again finds guidance in the decision of the Federal Court in *Kijal Resort Sdn Bhd* at p 864 held (6) which decides:

> The respondents were at liberty to raise the preliminary objection when the case came up for appeal at the Court of Appeal particularly when the High Court failed to consider their objections earlier. There was no legal impediment for that. The Court of Appeal was correct in hearing the preliminary objections and subsequently dismissing the appeal after allowing the objections.

[24] The Federal Court no less, has decided that a preliminary objection on the issue of the timeframe for filing a judicial review being exceeded could be raised and accepted even at the Court of Appeal stage. Given this binding precedent, this court accepts the preliminary objection raised by the

respondents in the matter before this court as there is no legal impediment in the law for such a recourse being undertaken by the respondents.

[25] It is also argued by the applicant's counsel that this issue of the judicial review being filed outside the timeframe allowed by O 53 r 3(6) of the Rules of Court 2012 cannot now be challenged as there was no objection raised by the attorney general at the leave stage though the documents were properly served by the applicant.

[26] This court does not concur with this argument as it was in held (5) at p 864 of the precedent of *Kijal Resort Sdn Bhd* that:

> At the leave stage, the application was made by the appellant ex parte. Both the first and second respondents were not present in court as they were not served with all the relevant documents. Obviously, the respondents could not be expected to raise any preliminary objection at the leave stage. Therefore, the question as to whether the respondents were barred and estopped from raising such preliminary objections after leave had been granted did not arise. The first appearance by both the respondents in the application was when the application was heard inter partes. That was the first and earliest opportunity for them to appear and to raise the preliminary objections. There was nothing irregular about that.

[27] In *Chow Hong Lit lwn Menteri Sumber Manusia, Malaysia & Satu Lagi* [1998] 3 MLJ 63 it was held pertaining to the role of the Attorney General's Chambers in accepting service of documents:

> Counsel for the applicant appeared to be confused about the position of the Attorney General as Attorney General under O 53 r 1(3) with that of the Attorney General as the legal adviser to the Government of Malaysia under art 145(2) of the Federal Constitution. As the Attorney General under O 53 r 1(3), the applicant must give notice to the Attorney General on his action for leave to apply for the orders of certiorari and mandamus, and the applicant must at the same stage lodge copies of the statement and affidavit in the Attorney General's Chambers as required by r 1(2). To achieve this purpose, the applicant had thus served the statement and affidavits in question on the Attorney General. Such service was not served on him as the legal adviser or as counsel representing the first respondent. Hence, after leave to apply for an O 53 of the RHC had been granted, the applicant was thus obliged to serve on the first respondent — as a person directly involved in this proceeding — notice of the originating motion under 2(1) and the documents required under r 3(1) through counsel from the Attorney General's Chamber.

[28] This court upon a careful study of the two precedents finds that the respondents in this judicial review are not barred and estopped from raising this preliminary objection at this stage of the proceedings. The service of the documents by the applicant on the Attorney General's Chambers before the leave application for judicial review was to satisfy the requirement of service and not in his capacity as the legal adviser to the government. The respondents

were not served with the documents for the leave stage of the judicial review and thus would not be in the position to raise any objection without being in possession of the relevant documents. The respondents appearance at the inter partes proceeding is their first and earliest opportunity for them to appear and raise the preliminary objection. Thus in this instant case the respondents are definitely entitled to raise the preliminary objection.

DECISION OF THE COURT

[29] This court upon the deliberations made has decided to uphold the preliminary objection raised by the respondents pertaining to this judicial review hence this judicial review is dismissed with the agreed costs of RM5,000.

Application dismissed with agreed costs of RM5,000.

Reported by Dzulqarnain Ab Fatar